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In the Supreme Court of the United States

OCTOBER TERM, 1980

NEW ENGLAND POWER COMPANY, Appellant

v.

NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION, et al.

COMMONWEALTH OF MASSACHUSETTS, et al., Appellants

v.

NEW HAMPSHIRE LEGISLATIVE UTILITY CONSUMERS' COUNCIL, et al.

DENNIS J. ROBERTS, II, ATTORNEY GENERAL OF THE STATE OF RHODE ISLAND, et al., Appellants

v.

NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION, et al.

ON APPEALS FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

BRIEF OF APPELLEES NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION AND STATE OF NEW HAMPSHIRE

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Questions Presented

The New Hampshire Public Utilities Commission ("PUC") has recently exercised its authority under a state statute originally enacted in 1913 to prohibit New England Power Company ("NEP") from selling outside the state any energy generated by NEP's federally licensed hydroelectric generating facilities in the State of New Hampshire ("New Hampshire"). NEP currently delivers the energy to an interstate transmission network for ultimate consumption in New Hampshire, the Commonwealth of Massachusetts ("Massachusetts"), and the State of Rhode Island ("Rhode Island"). The New Hampshire Supreme Court upheld the statute as applied by the PUC, and remanded the case for implementation. The appeal from the decision of the New Hampshire Supreme Court presents the following questions for review.

1. Does the New Hampshire statute as applied violate the Commerce Clause by imposing restrictions on the flow of locally generated hydroelectric energy out of New Hampshire?

2. Does the New Hampshire statute as applied violate the Privileges and Immunities Clause by denying to users located outside New Hampshire the opportunity to share in the benefits of locally generated hydroelectric energy?

3. Does the New Hampshire statute as applied violate the Supremacy Clause because the enactment of the Federal Power Act has preempted such state regulation?

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Summary of Argument

A. Commerce Clause

1. *Burden on interstate commerce.* New Hampshire has an interest in the flow of the Connecticut River, something not accruing to the riparian owner. This interest involves the use of the river for irrigation and power; and riparian owners of dams have only such rights in that flow as are granted by the state.

This interest in the potential energy distinguishes this appeal from cases such as *West v. Kansas Natural Gas Co.* (1911) and *Philadelphia v. New Jersey* (1978). Therefore, this appeal is more closely analogous to a line of cases beginning with *Geer v. Connecticut* (1896), which established that a state, because of its ownership of wild animals, could require that captured animals could be retained for consumption within the state. Later cases, such as *Foster-Fountain Packing Co. v. Haydel* (1928) and *Toomer v. Witsell* (1948), while arguably questioning the rationale of *Geer v. Connecticut,* still specifically embraced its limited holding.

Geer v. Connecticut was expressly overruled by *Hughes v. Oklahoma* (1979), which involved a statute forbidding the exportation of naturally bred minnows. This appeal, however, presents a factual situation distinguishable from *Hughes v. Oklahoma.* First, New Hampshire has more of an ownership interest in the Connecticut River than it does in wild animals which really have no owner until they are reduced to possession. Second, New Hampshire is more closely identified in its sovereign capacity with a public utility extracting hydroelectric energy than she is with a hunter or fisherman, since the utility is heavily regulated and has the power of eminent domain. To that extent, by analogy with *Reeves, Inc. v. Stake* (1980), which allowed South Dakota to retain state-produced cement, New Hampshire should be allowed to retain hydroelectric energy for consumption within the state.

2. *Congressional protection.* Even if, in 1981, *Hughes v. Oklahoma* compels the conclusion that a state may not restrict the exportation of hydroelectric energy, the law appeared otherwise in 1935. Accordingly, Congress reasonably believed that New

Hampshire could restrict such exportation when it enacted Part 1 of the Federal Power Act.

Section 201(b) of that Act clearly indicates a legislative intention to preserve the right of New Hampshire to restrict such exportation, at least as to preemption. In 1935 Congress could have failed to enact the savings clause as part of section 201(b). Again in 1978, when it amended that portion of section 201(b), a decision was apparently made not to withdraw the exemption. These enactments represent a legislative determination that such restrictions are appropriate exercises of concurrent state regulation. In the face of such determinations, this Court should defer to Congress to make the policy judgment of whether such restrictions are appropriate.

3. *Constitutional limitations.* The state appellants argue that the Constitution places certain limitations on Congressional power under the Commerce Clause. These appellants cite the Tenth Amendment, the Privileges and Immunities Clause and the Commerce Clause itself. The Privileges and Immunity Clause will be dealt with in section B of this summary.

The Commerce Clause does not present any inherent limitations on the powers of Congress. In *Prudential Insurance Co. v. Benjamin* (1946) this Court explicitly held that Congress may grant to the states the power to burden interstate commerce. In addition, Congress has enacted legislation that does not affect all states uniformly.

The Tenth Amendment also provides no bar to Congressional action in this appeal. Under the test established by *Hodel v. Virginia Surface Mining & Reclamation Assoc.* (1981), a federal statute must pass a three-part test. Under the first part, the federal statute must regulate states as states. In this appeal, the statute does not regulate the state appellants at all. Rather, it allows New Hampshire to regulate public utilities. Under the third part of the test, the federal statute must impair state governmental operations. Economic injury alone, as in this appeal, however, is insufficient to establish a violation.

B. Privileges and Immunities Clause

The Privileges and Immunities Clause, by its terms and under the cases, protects citizens of one state while subject to the jurisdiction of another. The New Hampshire statute as applied, however, does not treat citizens differently based on *citizenship*. Rather, it allows all consumers, located in New Hampshire to benefit from hydroelectric energy, regardless of citizenship. As a consequence, it also denies those benefits to out-of-state consumers, regardless of citizenship.

C. Supremacy Clause

1. *Part I of the Federal Power Act.* The provisions of Part I clearly establish that Congress envisioned some continuing state regulation of electric utilities. Therefore, since no such provision expressly grants or denies the power claimed by New Hampshire, analysis must turn to the purpose of the Act and the intent of Congress.

Part I is basically a licensing statute. The cases establish that the central purpose of Part I was to encourage the development of hydroelectric energy in harmony with other uses of navigable rivers such as transportation and recreation. In addition, the language of section 10(a) suggests that Congress intended to benefit interstate commerce by developing navigable rivers as highways. An intent to specifically benefit interstate commerce is not stated in connection with the development of water-power.

Congress was thus concerned more with the development of hydroelectric energy, rather than its transmission. The New Hampshire statute as applied does not inhibit such development.

2. *Part II of the Federal Power Act.* Part II establishes federal jurisdiction over the rates of interstate sales of electricity to distributors. It should be observed, however, that New Hampshire does not purport to regulate the rates of such sales in *other* states, although changes in rates may naturally result from the regulation.

If New Hampshire had actually forbidden the exportation of hydroelectric energy, presumably the ensuing intrastate sales

would be subject to her jurisdiction. The fact that New Hampshire chose a less restrictive measure should not invalidate the regulation.

The language of section 201(b) suggests that New Hampshire could retain power over hydroelectric energy even if that energy crosses state lines. This is reasonable given the difficulty and undesirability of the isolation of electric energy. Indeed, the 1978 amendment to section 201(b) require certain interconnections between utilities while preserving the protection of New Hampshire's statute. Congress therefore presumably intended that New Hampshire should have continuing jurisdiction over sales in New Hampshire even if some of the hydroelectric energy did in fact leave the state.

Argument

I. NEW HAMPSHIRE MAY CONDITION THE CONSTRUCTION OF DAMS AND THE EXTRACTION OF HYDROELECTRIC ENERGY FROM THE CONNECTICUT RIVER UPON COMPLIANCE WITH RSA 374:35 WITHOUT VIOLATING THE COMMERCE CLAUSE.

The transmission of electric current must, of course, be viewed as commerce. *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83, 86 (1927). Thus, a state proposal to impose conditions on the flow of electric current across state lines gives rise to an inquiry under the Commerce Clause.

The recent case of *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980) outlines the inquiry.

> This appeal presents two distinct but related questions with respect to the validity of the challenged Florida statutes. The first is whether the statutes, viewed independently of federal legislation regulating the banking industry, burden interstate commerce in a manner contrary to the Commerce Clause. The second is whether Congress, by its own legislation in this area, has created an area in which the States may regulate free from Commerce Clause restraints.

Id. at 35 (footnote omitted). The second question becomes pertinent only if the Court reaches an affirmative answer to the first. *Id.*

To these two initial questions, Massachusetts and Rhode Island would add a third, which would become pertinent only if the Court reached an affirmative answer to the second. This third question is whether such Congressional legislation violates other provisions of the Constitution.

A. *The New Hampshire statute as applied does not burden interstate commerce in a manner contrary to the Commerce Clause.*

A long line of cases has established the principle that a state may not protect natural resources located within her borders from consumption by her sister states. *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911) (gas); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923) (gas); *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (landfill space). These cases, however, all involve the situation where private interests have complete ownership of those resources.

Running water, such as that in the Connecticut River, contains the potential for hydroelectric energy. This potential energy may be converted into a marketable commodity just as wood or granite, two other New Hampshire resources. To the extent that the state has an ownership interest in the resource, one faces a question left expressly open in *Philadelphia v. New Jersey, supra*, 437 U.S. at 627, n.6.

The Connecticut River, up to the low water mark on the Vermont side, lies within New Hampshire. *Vermont v. New Hampshire*, 289 U.S. 593, 619-620 (1933). Title to the lands under water enures to the state within which they are situated. *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 321-322 (1973) citing *Hardin v. Jordan*, 140 U.S. 371, 381 (1891). *See also* Submerged Lands Act of 1953, 67 Stat. 29, 43 U.S.C. §§ 1301-1356 (1976 & Supp. 1979). The states are then left to determine the property rights of riparian owners. *Bonelli Cattle Co. v. Arizona, supra*, 414 U.S. at 319 citing *Arkansas v. Tennessee*, 246 U.S. 158, 176 (1918).

Under state law, New Hampshire may convey property rights in the bed of the Connecticut River. *New Hampshire Water Resources Board v. Lebanon Sand & Gravel Co.*, 108 N.H. 254, 259-260, 233 A.2d 828, 831 (1967). The flow of the Connecticut River, however, is not susceptible of private ownership. *St. Regis Paper Co. v. New Hampshire Water Resources Board*, 92 N.H. 164, 171, 26 A.2d 832, 838 (1942) citing *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 424 (1940).

This Court has faced the question of the asserted private rights of riparian owners in the potential energy in navigable rivers. Such attempts to assert direct ownership have been consistently denied. *See United States v. Twin City Power Co.*, 350 U.S. 222, 228 (1956); *United States v. Appalachian Electric Power Co.*,

supra; United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 69 (1913). The private right to the use of the water depends not on the qualified title to the bed of a river or to the ownership of land bordering the river, but "must come from some right which that company has to construct and maintain such works in the river, such as dams, walls, dykes, etc., essential to the utilization of the power of the stream for commercial purposes." *United States v. Chandler-Dunbar Water Power Co., supra.*

NEP has been granted conditional rights to the potential energy of the Connecticut River. Since 1913, New Hampshire has prohibited the exportation of hydroelectric energy without the consent of the PUC. *See* RSA 374:35 and its precursors.[1] Since 1926 NEP or a predecessor company has obtained permission from the PUC to export hydroelectric energy from all plants in New Hampshire except Vernon Station, which was constructed prior to 1913.[2] *Appeal of New England Power Co.*, J.S.A. 3a.[3] Pursuant to its statutory authority, the PUC has, from time to time, approved NEP's requests to export hydroelectric energy. *See Connecticut River Power Co. & New England Power Co.*, 36 N.H.P.U.C. 302, 311-312 (1954); *Grafton Power Co.*, 12 N.H.P.S.C. 194, 200-201 (1929).

If New Hampshire seeks to ground her restrictions on the exportation of hydroelectric energy on her prior rights in the poten-

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[1]"RSA" refers to the New Hampshire Revised Statutes Annotated. RSA 374:35 and RSA 374:36 first appeared as part of an amendment to the 1911 law which established the New Hampshire Public Service Commission. 1913 N.H. Laws 145:17 (see Appendix below). In 1926 the law was amended to drop the exception for hydroelectric energy generated from the Connecticut River and codified as Public Law ("P.L.") 240:33 and 240:34. The statutes, as they existed in 1935, are set out in the Appendix. RSA 374:35 and 374:36 in their present form are also set out in the Appendix.

[2]The statutes apply only to additional hydroelectric energy generated after May 15, 1911. RSA 374:36.

[3]"J.S.A." refers to the Appendix to the Jurisdictional Statement filed by NEP in No. 80-1208. The decision of the New Hampshire Supreme Court is reported at 120 N.H. 866, 424 A.2d 807 (1980).

tial energy in the flow of the river, she must apparently first reconcile the cases dealing with similar restrictions on the exportation of wild animals. The early case of *Geer v. Connecticut*, 161 U.S. 519 (1896), established that a state may prohibit the exportation of wild animals caught within its borders. Subsequent cases confirmed and apparently broadened the rule. *See, e.g., Lacoste v. Department of Conservation*, 263 U.S. 545, 549 (1924) and cases cited therein.

In *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928), the Court struck down a statute that prohibited the exportation of raw shrimp, but allowed locally processed shrimp to be exported. The Court distinguished *Geer v. Connecticut* on the basis that nearly all of the shrimp was in fact destined for sale in interstate commerce. The Court went on to explicitly reiterate the holding of *Geer v. Connecticut:* "As the representative of its people, the State might have retained the shrimp for consumption and use therein." *Foster-Fountain Packing Co. v. Haydel, supra*, 278 U.S. at 13.[4] Similar analysis was used in *Toomer v. Witsell*, 334 U.S. 385, 405-406 (1948) to declare that a state statute requiring owners of shrimp boats fishing in the maritime belt off South Carolina to dock at a South Carolina port and unload, pack and stamp their catch (with a tax stamp) before shipping it to another state burdened interstate commerce in violation of the Commerce Clause. In so doing, the Court quoted the above passage from *Foster-Fountain Packing Co. v. Haydel. Toomer v. Witsell, supra*, 334 U.S. at 404-405.[5]

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[4]Mr. Justice McReynolds stated the position even more forcefully in his separate opinion. "Manifestly, Louisiana has full power absolutely to forbid interstate shipments of shrimp taken within her territory." *Id.* at 15.

[5]As late as 1978, the Court was still citing *Foster-Fountain Packing Co. v. Haydel* for the proposition

> that the Commerce Clause circumscribes a State's ability to prefer its own citizens in the utilization of natural resources found within its borders, *but destined for interstate commerce*. Like Louisiana's shrimp in Foster Packing, Alaska's oil and gas here are bound for out-of-state consumption.

Hicklin v. Orbeck, 437 U.S. 518, 533 (1978) (emphasis added).

The dissent in *Geer v. Connecticut, supra,* 161 U.S. at 539-540, questioned the theory of ownership of wild fish, birds, or animals. This theme echoed through the later decisions of *Toomer v. Witsell, supra,* 334 U.S. at 402, and *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 284 (1977). *Cf. Missouri v. Holland,* 252 U.S. 416, 434 (1920) (police power preferred to ownership theory as basis of decision). Finally, in 1979, *Geer v. Connecticut,* was expressly overruled in *Hughes v. Oklahoma,* 441 U.S. 322 (1979). *Hughes v. Oklahoma* involved a statute which provided that no person could transport or ship for sale outside Oklahoma minnows which were procured within state waters. The court dismissed the theory of state ownership of wild animals as a 19th century legal fiction and went on to evaluate the statute under the general rule as set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

The instant appeal is distinguishable from *Hughes v. Oklahoma,* however, for several reasons. First, the nature of the interest that a state has in the flow of her rivers, although in many ways similar to her interest in wild animals, differs in certain respects. Wild animals may be thought to have no owner "until they are reduced to possession by skillful capture." *Hughes v. Oklahoma, supra,* 441 U.S. at 334 quoting *Douglas v. Seacoast Products, Inc., supra,* 431 U.S. at 284. Under Roman law they were considered *res nullius,* no one's thing. Running water for irrigation or power, however, would fall under the heading of *res communes,* something shared in common by all. *See* Pound, *An Introduction to the Philosophy of Law* 197-198 (1922).[6]

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[6]Pound, however, counsels against stringent regulation of *res communes* by declaring that they are the property of the state. *Id.* at 198-199. *But see United States v. Texas,* 339 U.S. 707 (1950):

> "Dominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged, in construing either grants by the sovereign of the lands to be held in private ownership or transfer of sovereignty itself. . . ."

In *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908), the Court sustained a New Jersey statute that prohibited any person from transporting the waters of any fresh water pond or stream of the state into any other state. Appellant had attacked the statute under the Due Process, Equal Protection, Commerce, and Privileges and Immunities Clauses. Although the lower court had rested its analysis on the residuum of public ownership in the state, Mr. Justice Holmes in delivering the opinion of the Court placed authority on the broader ground of police power. *Id.* at 355. In so doing, however, the Court gave New Jersey an essentially free hand to control state waters.

> We are of opinion, further, that the constitutional power of the State to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs. The legal conception of the necessary is apt to be confined to somewhat rudimentary wants, and there are benefits from a great river that might escape a lawyer's view. But the State is not required to submit even to an aesthetic analysis. Any analysis may be inadequate. ***It finds itself in possession of what all admit to be a great public good, and what it has it may keep and give no one a reason for its will.***

Id. at 356-357 (emphasis added). *Cf. United States v. Twin City Power Co., supra; United States v. Appalachian Electric Power Co., supra; United States v. Chandler-Dunbar Water Power Co., supra.*

> . . . Texas prior to her admission was a Republic. We assume that as a Republic she had not only full sovereignty over the marginal sea but ownership of it, of the land underlying it, and of all the riches which it held. In other words, we assume that it then had the *dominium* and *imperium* in and over this belt which the United States now claims.

Id. at 717 quoting *United States v. Oregon*, 295 U.S. 1, 14 (1935). *United States v. Texas* was decided just two years after *Toomer v. Witsell* where the Court had cited Pound in discussing ownership of fish and game. *Toomer v. Witsell, supra*, 334 U.S. at 402 n. 37.

The second distinction lies in the nature and extent of the state involvement in the instant appeal. Had New Hampshire thought she had no power to restrict the transmission of hydroelectric energy out of state, she might have been tempted to take a more active role in developing her sources of hydroelectric energy.[7] If New Hampshire had originally determined to purchase or build her own hydroelectric generating facilities, she could presumably withhold the electricity for use by her citizens under *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980). That case involved the decision by South Dakota to forbid the export of cement produced at state-owned factories. It does not indicate whether South Dakota purchased the raw materials for processing from private sources. To the extent that New Hampshire owned both the resource and the processing facility, New Hampshire would appear to be in a stronger position.

Indeed, New Hampshire might well meet the threshold issue identified by the dissent in that case. Traditional distinctions be-

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[7]At its most recent session, the New Hampshire General Court passed a law giving the New Hampshire Water Resources Board explicit power to take a more active role in the development of hydroelectric production facilities. 1981 N.H. Laws ch. 505. For example, the Water Resources Board may now "investigate and identify facilities for the production and utilization of hydro-energy," RSA 481:3,I as amended by 1981 N.H. Laws 505:3, acquire and use such facilities, RSA 481:3,III as amended by 1981 N.H. Laws 505:3; construct, reconstruct, maintain and operate hydro-energy production facilities, RSA 481:2,V and RSA 481:3,V as amended by 1981 N.H. Laws 505:2 and 505:3 respectively, and "apply for and hold all necessary permits and licenses, and to meet all requirements of the Federal Energy Regulatory Commission in developing hydro-energy production facilities," RSA 481:3,X as amended by 1981 N.H. Laws 505:3. The Water Resources Board is also directed to insert in all its contracts for the operation, use and distribution of hydro-energy a provision "that in the event of a shortage crisis, as determined by the governor and council, in either the water resources of the state or the capacity to fulfill the electrical requirements of the state, the governor and council may suspend the terms of contracts which provide services outside of the state to fulfill the needs and requirements of the citizens of New Hampshire." RSA 481:8,III as amended by 1981 N.H. Laws 505:6.

tween governmental and proprietary functions arose primarily in the area of tort liability for local governmental entities and entailed little uniformity. *See, e.g., Restatement of Torts, Second* § 895C, comment e (A.L.I. 1979). Accordingly, in *Brush v. Commissioner*, 300 U.S. 352 (1937), the Court rejected analysis under state tort law and held that, for purposes of determining immunity from federal taxation, the municipal supply of water was considered a governmental activity. The Court declined to establish any fixed criteria for determining the classification of a given activity. *Id.* at 356-366. The conservation and distribution of electricity, like water, would appear to be imbued with a strong public interest.[8] *See id.* at 366. Without electricity, many essential governmental functions could hardly be provided.[9] *See id.* at 370-371.

As history would have it, however, New Hampshire did not decide to get into the business of producing hydroelectric energy. Instead, she authorized and encouraged private corporations to develop the hydroelectric potential in the Connecticut River.

Without doubt, all such corporations are public utilities. *See* RSA 362:2; *Opinion of the Justices*, 84 N.H. 559, 149 A. 321 (1930); *State v. New Hampshire Gas & Electric Co.*, 86 N.H. 16, 163 A. 724 (1932). As a public utility, each corporation is imbued with certain attributes of the sovereign such as the power to take land by eminent domain. *See* RSA 371:1; *Public Service Co. v. Shannon*, 105 N.H. 67, 192 A.2d 608 (1963).[10] In allowing such

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[8]*See, e.g.*, section 201(a) of the Federal Power Act: "It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest. . . ." 16 U.S.C. § 824(a) (1976).

[9]One may observe, of course, that the government of New Hampshire is not likely to grind to a halt if it is not allowed to harvest the monetary benefits of its cheap hydroelectric energy. Higher costs for electricity, however, may well have an impact on the way the government structures its affairs. *Cf. National League of Cities v. Usery*, 426 U.S. 833 (1976).

[10]RSA ch. 371 was recently repealed, however, apparently by accident. *See* 1981 N.H. Laws 493:18. Chapter 483 was designed to transfer

corporations to supply an essential public service, New Hampshire has since 1926 expressly conditioned the exportation of hydroelectric energy generated from the Connecticut River on the permission of the PUC.[11]

These public utilities may thus be viewed as more closely identified with the sovereign than were the minnow dealers in *Hughes v. Oklahoma*. To that extent, the instant appeal more closely resembles the situation presented in *Reeves, Inc. v. Stake*.

B. *Congress has created an area where New Hampshire may regulate the exportation of hydroelectric energy free from Commerce Clause restraints.*

If the Court determines that the New Hampshire statute restricting the export of hydroelectric energy burdens interstate commerce in a manner contrary to the Commerce Clause, it must then consider whether Congress, by its own legislation, has allowed New Hampshire to impose such restrictions free from Commerce Clause restraints.

> Congress, of course, has power to regulate the flow of interstate commerce in ways that the States, acting independently, may not. And Congress, if it chooses, may exercise this power indirectly by conferring upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy.

Lewis v. BT Investment Managers, Inc., supra, 447 U.S. at 44.[12] Therefore, to the extent that the holding of *Hughes v. Oklahoma* can be read to encompass and protect the exportation of

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the duty of establishing just compensation from the PUC to the Eminent Domain Commission in condemnation proceedings brought by utilities.

[11] *See* footnote 1, *Supra*. None of the generating facilities affected by this appeal were built prior to 1927.

[12] *See also H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 542-543 (1949); *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 423-424 (1946); *International Shoe Co. v. Washington*, 326 U.S. 310, 315 (1945), *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769 (1945).

hydroelectric energy, New Hampshire must seek Congressional confirmation of her power to restrict such exportation.

Accordingly, New Hampshire looks to the provisions of section 201(b) of the Federal Power Act. In its present form, that section provides in pertinent part:

> *The provisions of this subchapter* [Part I] shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) *shall not* apply to any other sale of electric energy or *deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line.*

16 U.S.C. § 824(b)(1) (Supp. 1979) (emphasis added). Although this language is not that usually used by a legislature when authorizing an act, the history of the enactment of that section demonstrates that Congress intended to clothe New Hampshire with authority over the exportation of hydroelectric energy.

Section 201(b) had its genesis in Senate Bill 2796 which was introduced to the House of Representatives on June 27, 1935. That version did not contain any reference to state authority over the exportation of hydroelectric energy.[13] The bill, amended to pro-

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[13] 79 Cong.Rec. 10315 (June 27, 1935):

> The provisions of this part shall apply to the transmission of electric energy in interstate commerce, to the sale of electric energy at wholesale in interstate commerce, and to the production of electric energy for such transmission or sale, but shall not apply to the retail sale of such energy in local distribution. The Commission shall have jurisdiction over all facilities for such production, transmission, or sale of electric energy by any means and over all facilities connected therewith as parts of a system of power transmission situated in more than one State, except facilities used only for the production or transmission of electric energy in intrastate commerce or in local distribution or for the use of the producer or transmitter. Every person who owns or operates facilities subject to the jurisdiction of the Commission under this part shall be subject to the provisions of this part and the part next following.

vide such authority, was passed by the House of Representatives on July 9, 1935.[14] The clause was inserted by the House Committee on Interstate and Foreign Commerce.[15]

Just prior to its passage, New Hampshire Representative William A. Rogers urged his colleagues to adopt the amended version. In discussing the language at issue in this case, Representative Rogers said:

> Just one further word. I do want to call attention, if I have a moment, to the fact that as a result of the service rendered by the junior Senator from New Hampshire on the public service commission of our State, we, for a long time, have had a public service commission which properly protects the rights of the citizens as against these damnable curses; but the Senate bill as originally drawn would deprive certain States, I think five in all, of certain rights which they have over the exportation of hydroelectric energy which is transmitted across the State line. This situation has been taken care of by the House committee, and I hope when you come to it, section 201 of part II, that you will grant us the privilege to continue, as we have been for 22 years, to exercise our State right over the exportation of hydroelectric energy

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[14]79 Cong.Rec. 10830 (July 9, 1935):

> The provisions of this part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce but shall not apply to any other sale of electric energy or deprive a State or State Commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction over the facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

[15]H.R.Rep. No. 1318, 74 Cong. 1st Sess. 27 (1935). The Committee met in executive session, however, so that the minutes are unavailable for review at this time.

transmitted across State lines but produced up there in the granite hills of old New Hampshire. [Applause.]

[Here the gavel fell.]

79 Cong.Rec. 10527 (July 1, 1935). The language at issue was retained by the Conference Committee. *See* Conference Committee Report, 79 Cong.Rec. 14600, 14614 (August 24, 1935).

There can be little doubt that the stated exception in section 201(b) was aimed at the 1935 predecessor of RSA 374:35 and similar legislation then in existence.[16] This should be clear from the plain reference to the exportation of hydroelectric energy. In addition, Representative Rogers in the above-quoted passage specifically refers to a state power in existence for 22 years governing the exportation of hydroelectric energy. This presumably refers to the legislation enacted in 1913, 22 years prior to 1935, which later became RSA 374:35. *See* 1913 N.H. Laws 145:17.

It is reasonable to infer from the legislative history that in 1935 Congress believed that a state could control the exportation of hydroelectric energy free of Commerce Clause restraints. Representative Rogers apparently believed so. In the above-quoted passage, Representative Rogers was afraid that the bill would deprive certain states of those rights ***which they already had*** over the exportation of hydroelectric energy. He spoke in terms of ***continuing*** to exercise a state right over such exportation.

This assumption is entirely consistent with the cases cited earlier. In 1935, *Geer v. Connecticut* was still good law. *Foster-Fountain Packing Co. v. Haydel* had confirmed the states' power to retain their communally-owned resources for their own consumption. The first direct questioning of the ownership theory in *Toomer v. Witsell* was still over a dozen years away. In

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[16]At least three other state statutes governing the exportation of hydroelectric energy appear to have come under this exception. *Safe Harbor Water Power Corp.*, 5 F.P.C. 221, 235 (1946). They included: Me.Rev.Stat. ch. 68, § 1 (1930); Wis.Stat. § 31.27 (1931); and 1929 W.Va. Acts ch. 58, § 6*(f)*. These statutes are set forth in the Appendix. *See also* footnote 31, *infra*.

fact, *Geer v. Connecticut* would not be overruled until over forty years later.[17]

If, however, Congress did not believe that the states had that power, the inserted language and the speech of Representative Rogers must be viewed in a different light. The phrase "lawful authority now exercised" as used in the section could not refer to lawfulness under the Constitution. If it did, the purported exception would be without any meaning or effect. Thus, the phrase must be read to use "lawful" in the sense of "enacted into law." Under that construction, a statute would apparently be considered lawful if appropriately enacted until invalidated by a court. If Congress believed those statutes were unconstitutional, however, in order to make section 201(b) meaningful, Congress must have intended, in the words of Representative Rogers, to "grant" to New Hampshire a "privilege" which she did not have: that is, to continue to exercise power over the exportation of hydroelectric energy, free of Commerce Clause restraint. New Hampshire would need this grant, in addition to the exemption from preemption, in order to have any rights at all.

Appellants may argue that Congress preferred to delegate authority to the courts to determine on a case-by-case basis the lawfulness of the authority a state exercised over the exportation

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[17]Appellants may argue that the instant appeal should be analogized to the situation presented to the Court in *United States v. Public Utilities Commission of California*, 345 U.S. 295 (1953). That case involved the question of whether section 20 of the Federal Power Act, 16 U.S.C. § 813 (1976), (set forth in the Appendix), contained a grant of authority to Congress so that California might circumvent the holding in *Public Utilities Commission v. Attleboro Steam & Electric Co.* At the time of the enactment of section 20, however, the jurisdictional line had not been determined between local and national authority. *United States v. Public Utilities Commission of California, supra*, 345 U.S. at 303. In this appeal, the relevant case determining state rights under the Commerce Clause was specifically reversed many years after section 201(b) was enacted. In addition, the language and history of section 201(b) suggests that Congress considered a much more specific and narrow class of state regulation, than envisioned under section 20.

of hydroelectric energy. If Congress had intended to do so, however, it could have perhaps used more explicit language. For example, Congress could have said: "The provisions of this subchapter . . . shall not . . . deprive a State or State commission of any *otherwise* lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line." If Congress harbored any such doubts about the constitutionality of New Hampshire's statute, they certainly do not appear in the language of section 201(b) or in the remarks of Representative Rogers.

Thus, as stated above, the language and history of section 201(b) most reasonably suggests that Congress intended to preserve what it believed to be a lawful exercise of state power. The adoption of the exemption therefore amounts to a legislative determination that the exercise of such power by a state is not unreasonable in light of federal policy and federal control over hydroelectric energy. If Congress felt otherwise in 1935, it need not had created the exemption at all.

If the "evolutionary process" [18] of judicial analysis under the Commerce Clause has carried us away from the prevailing view in 1935, the legislative determination may need review as well. If Congress now feels that New Hampshire should not exercise such power, it may revoke the exemption.[19] But such modification in

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[18] *Hughes v. Oklahoma, supra,* 441 U.S. at 326.

[19] In this connection, it is interesting to note the 1978 amendments to the Federal Power Act. Public Utilities Regulatory Policies Act of 1978, P.L. 95-617, 92 Stat. 3117 ("PURPA"). Those amendments took away a portion of the broad exemption that had been granted under section 201(b) to state authority over the exportation of hydroelectric energy. PURPA § 204(b)(1), 92 Stat. 3140, 16 U.S.C.A. § 824(b). Beginning in 1978, those states would be subject to the provisions of sections 210, 211 and 212 of the Federal Power Act, 16 U.S.C. §§ 824i, 824j & 824k (Supp. III 1979), which deal with the interconnection authority and wheeling authority of FERC. This special exception would hardly be necessary if Congress did not continue to feel that the original exemption carried some effect.

the face of an apparent legislative policy determination, should be for Congress, not the Court, to make.[20]

C. *The delegation by Congress of the authority to regulate the exportation of hydroelectric energy does not violate the Commerce Clause, the Tenth Amendment or the Privileges and Immunities Clause.*

Massachusetts and Rhode Island have raised the question of whether there are any constitutional limitations on the power of Congress to delegate authority to a state to regulate interstate commerce.[21] None of the cited provisions, however, place limitations on the power of Congress which would be relevant to this appeal.

1. *Commerce Clause.* The Commerce Clause provides that "Congress shall have Power . . . To regulate Commerce . . . among the several States . . . ." U.S. Const. Art I, § 8, cl. 3. As stated in *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 423 (1946), the Clause gives rise to two distinct lines of analysis. First, it contains a grant of plenary and supreme authority over interstate commerce to Congress.

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[20]*Cf. Commonwealth Edison Co. v. Montana*, 49 U.S.L.W. 4957, 4962, 4969 (July 2, 1981); *Massachusetts v. United States*, 435 U.S. 444, 456 (1978). Although discussing a question of State taxation, the Court in *Commonwealth Edison Co. v. Montana* felt constrained to allow Congress to determine when particular State actions are thought to be contrary to federal interests. *Id.* at 4962. In his concurring opinion, Mr. Justice White observed that "Congress has the power to protect interstate commerce from intolerable or even undesirable burdens. It is also very much aware of the Nation's energy needs . . . ." Id. at 4969. New Hampshire, like Montana, does not have the political power to impose its will on the rest of the country.

[21]Massachusetts has raised and briefed these issues; and Rhode Island has adopted those portions of the Massachusetts brief. For ease of reference during the balance of part I and all of part II, this brief will refer only to Massachusetts. The arguments of course apply with equal force to Rhode Island.

> The only limitation it places upon Congress' power is in respect to what constitutes commerce, including whatever rightly may be found to affect it sufficiently to make congressional regulation necessary or appropriate.

Id. (footnote omitted). Second, it contains an "implied prohibition" on the power of the states to burden interstate commerce.

> The one limitation bounds the power of Congress. The other confines *only* the powers of the states.

Id. (emphasis added).[22]

Massachusetts appears to have two related arguments. First, Massachusetts may argue that Congress does not have the power to allow a state to unduly burden interstate commerce in ways which would create "tendencies toward economic Balkanization," *Hughes v. Oklahoma, supra,* 441 U.S. at 325, or which would frustrate the principle that "our economic unit is the nation," *H.P. Hood & Sons, Inc. v. Du Mond, supra,* 336 U.S. at 537. *See* Brief of Massachusetts 84. This view appears to invoke the implied prohibition directed at the states against the grant of power directed to Congress. Taken to its logical conclusion, however, this view would place an enormous restriction on Congressional power under the Commerce Clause.

> In this view the limits of state power to regulate commerce in the absence of affirmative action by Congress are also the limits of Congress' permissible action in this respect, whether taken alone or in coordination with state legislation.
>
> Merely to state the position in this way compels its rejection. So conceived, Congress' power over commerce would be nullified to a very large extent.

Prudential Insurance Co. v. Benjamin, supra, 328 U.S. at 422.

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[22] *See also Western & Southern Life Insurance Co. v. State Board of Equalization,* 49 U.S.L.W. 4542, 4543 (May 26, 1981) (emphasis in original): "Our decisions do not, however, limit the authority of *Congress* to regulate commerce among the several States as it sees fit."

Massachusetts' second argument is somewhat more restricted in scope. Reduced to its essentials, the argument calls for a limiting of Congressional authority under the Commerce Clause to those cases where Congress delegates powers uniformly among the states. No case on point is cited, however. Indeed, Congressional delegation of power to all states would be more burdensome on interstate commerce than the delegation of power to only one or two. This would create "the anomaly . . . that statutes imposing the most extreme burdens on interstate commerce . . . [would be] the most immune from challenge." *Hughes v. Oklahoma, supra,* 441 U.S. at 335.

The argument also fails to consider the problems inherent in determining uniformity. A statute that allows all states to regulate the exportation of raw shrimp would hardly have uniform application. Even a statute that allows all states to regulate the exportation of hydroelectric energy would benefit some states more than others.[23] Indeed, this Court has sustained Congressional actions pursuant to the Commerce Clause which provided disparate treatment in the application of various protective measures. *See Secretary of Agriculture v. Central Roig Refining Co.*, 338 U.S. 604, 616 (1950) (sugar production); *South Carolina v. Katzenbach*, 383 U.S. 301, 328-329 (1966) (voting rights); *Hodel v. Indiana*, 49 U.S.L.W. 4667, 4671 (June 15, 1981) (prime farmland).

As stated above, Congress has not determined to reverse its earlier acceptance of the New Hampshire statute. This Court should therefore defer to Congress the determination of appropriateness of the authority granted by section 201(b).

2. *Tenth Amendment.* The Tenth Amendment by its terms deals with the rights of a state vis-á-vis the federal government. Under the Amendment, "Congress may not exercise power in a

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[23]In fact, in a limited sense, the section 201(b) delegation of power would be uniform since it applied to all states equally, though only a limited number who had already undertaken regulation would benefit. It may perhaps be compared with a grandfather clause which acts to protect those states which have demonstrated a willingness or desire to regulate hydroelectric energy.

fashion that impairs the States' integrity or their ability to function effectively in a federal system." *Fry v. United States*, 421 U.S. 542, 547, n.7 (1975). To be invalid, the statute must regulate a state in a way which interferes with sovereign state functions. *See Id.*

The recent case of *Hodel v. Virginia Surface Mining & Reclamation Assoc.*, 49 U.S.L.W. 4654, 4660 (June 15, 1981) sets out a three-part test culled from *National League of Cities v. Usery, supra*. Under the first prong of the test, the Court must determine whether the statute regulates the "States as States." The federal statute, however, does not regulate *Massachusetts* at all. Rather, it allows *New Hampshire* to regulate certain public utilities. *See Hodel v. Virginia Surface Mining & Reclamation Assoc., supra.*

The third prong of the test involves a determination whether the states' compliance with the federal law would directly impair their ability to structure integral operations in areas of traditional functions. Again, the federal statute does not directly regulate Massachusetts. Even if the New Hampshire statute as applied has a "measurable impact" on Massachusetts' economy, "this kind of effect, standing alone, is insufficient to establish a violation of the Tenth Amendment." *Id.* at 49 U.S.L.W. at 4661 n.33.

Massachusetts' real objection, of course, is that section 201(b) treats different states differently. To the extent that such absence of uniformity is the basis for claims under the Tenth Amendment, analysis under the Amendment would not seem to add significantly to the arguments advanced as limitations to Congressional power directly from the Commerce Clause, as discussed above.

3. *Privileges and Immunities Clause.* Massachusetts finally argues that the Privileges and Immunities Clause may constitute a limitation of the power of Congress under the Commerce Clause. Be that as it may, the validity of the New Hampshire statute under the Privileges and Immunities Clause will be discussed below in section II. If the statute as applied does not violate that Clause, as will be shown below, Congress should be able to give it protection from the "implied prohibition" of the Commerce Clause.

II. BY SECURING THE BENEFITS OF RELATIVELY INEXPENSIVE HYDROELECTRIC ENERGY FOR USERS WITHIN THE STATE, NEW HAMPSHIRE DOES NOT VIOLATE THE PRIVILEGES AND IMMUNITIES CLAUSE.

It is well settled that the Privileges and Immunities Clause protects people, not states. *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1975). It may be understood, however, that Massachusetts makes her arguments as *parens patriae* on behalf of her citizens. *See id.* and cases cited therein.

The Privileges and Immunities Clause provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const., Art. IV, cl. 1, § 1. As the language of that Clause suggests, such protection extends to citizens of one state while *in* other states. This Court has never held that New Hampshire must afford to Massachusetts citizens, while they are in Massachusetts, the privileges afforded by New Hampshire to its citizens while in New Hampshire.

The cases seem uniformly to recognize the requirement that a citizen of one state must be physically within another state in order to invoke the Clause. The Clause "insures to [citizens of one state] *in other States* the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property. . . ." *Paul v. Virginia*, 75 U.S. 168, 180 (1868) (emphasis added). "The Constitution forbids only such legislation affecting citizens of the respective States as will substantially or practically put a citizen of one state in a condition of alienage *when he is within* or when he removes to another State . . . ." *Blake v. McClung*, 172 U.S. 239, 256 (1889) (emphasis added). "[The Clause] was designed to insure to a citizen of State A *who ventures into* State B the same privileges which the citizens of State B enjoy." *Toomer v. Witsell*, 334 U.S. 385, 395 (1948) (emphasis added). "The Clause thus establishes a norm of comity without specifying the particular subjects as to which citizens of one State *coming within* the jurisdiction of another are guaranteed equality of treatment." *Austin v. New Hampshire*, 420 U.S. 656, 660 (1975) (emphasis added).

Massachusetts, seems to argue, however, that the effect of the New Hampshire statute is to "impose a tax through the imposition of a higher rate for electricity in Massachusetts." Brief of Massachusetts 74. This is, to say the least, a curious line of reasoning. It seems to imply that Massachusetts citizens simply by consuming electricity are being subjected to the taxing jurisdiction of New Hampshire.

The New Hampshire statute, however, is simply not a taxing statute. To the extent that one may want to look at the effects of the statute, a more useful analogy may be to a tax on resources, not on individuals. For example, a tax imposed on the severance of coal was upheld in *Commonwealth Edison Co. v. Montana*, 49 U.S.L.W. 4957 (July 2, 1981). A tax on hydroelectric energy in the amount of the difference between its cost and the average cost of other sources of energy might have a similar effect on purchasers not located in New Hampshire as the present statute would. These effects would affect on purchasers as purchasers, however, not as citizens.

Massachusetts citizens, while in New Hampshire, may consume New Hampshire produced hydroelectric energy. In this respect they are treated no differently from New Hampshire citizens. New Hampshire citizens, while in Massachusetts, may not consume New Hampshire produced hydroelectric energy. In this respect they are treated no differently from Massachusetts citizens.

The essential flaw in Massachusetts' reasoning may perhaps rest on an unstated assumption that Massachusetts citizens have a right to have the benefits of hydroelectric energy flow out of New Hampshire and into Massachusetts. Such right, if it exists at all, would seem more properly to come from the Commerce Clause, not from the Privileges and Immunities Clause.

III. THE NEW HAMPSHIRE STATUTE AS APPLIED DOES NOT VIOLATE THE SUPREMACY CLAUSE BECAUSE CONGRESS DID NOT INTEND TO PREEMPT SUCH REGULATION BY ENACTING THE FEDERAL POWER ACT.

The Supremacy Clause provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. Art. VI, cl. 2. "Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 49 U.S.L.W. 4562, 4568 (May 26, 1981) citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Where the field which Congress is said to have preempted has been traditionally occupied by the states, this assumption "provides assurance that 'the federal-state balance' will not be disturbed unintentionally by Congress or unnecessarily by the Courts." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) quoting *United States v. Bass*, 404 U.S. 336, 349 (1971). The regulation of electric utilities has traditionally been performed by the states. *United States v. Public Utilities Commission of California*, 345 U.S. 295, 302-303 (1953).

A Congressional purpose to displace state law may be evidenced in several ways. A number of these ways are set forth in *Maryland v. Louisiana, supra*, 49 U.S.L.W. at 4568.

A. *Part I of the Federal Power Act does not preempt the New Hampshire statute.*

Part I of the Federal Power Act was originally enacted in 1920 as the Federal Water Power Act. 41 Stat. 1063. Part I is presently codified as 16 U.S.C. §§ 792-823 (1976).

An analysis of the provision of Part I indicates that the scheme of federal regulation is not "so pervasive as to make reasonable the inference that Congress left no room for the states. . . ." *Rice v. Santa Fe Elevator Corp., supra,* and cases cited. Indeed, Part I leaves to the states a portion of their traditional jurisdiction. *First Iowa Hydro-Electric Coop. v. FPC,* 328 U.S. 152, 171 (1946).

Section 9(b) of the Act, 16 U.S.C. § 802(b) (1976), requires an applicant for a license under the Federal Power Act to give evidence of compliance with state laws.[24] While the specific references in this section "neither add anything to nor detract anything from the force of the local laws, if any, on those subjects," *First Iowa Hydro-Electric Coop. v. FPC, supra,* 328 U.S. at 178, the provision plainly indicates that Congress expected that some state regulation would survive.[25]

In section 19 of the Act, 16 U.S.C. § 812 (1976), Congress specifically provided for the regulation of intrastate sales of power generated at a licensed facility by the state in which the sale was made.[26] In addition, section 20 of the Act, 16 U.S.C. § 813 (1976), while insufficient to vest the states with authority to regulate interstate sales in wholesale quantities to distributing

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[24]16 U.S.C. § 802(b) provides:

> (b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this chapter.

[25]It may be remembered that in 1920, New Hampshire could presumably have preserved all hydroelectric energy for local consumption under *Geer v. Connecticut.* At that time, not even *Foster-Fountain Packing Co. v. Haydel* had been decided.

[26]16 U.S.C. § 812 provides in pertinent part:

> As a condition of the license, every licensee under this chapter which is a public-service corporation, or a person, association, or

companies for resale to consumers, nevertheless allows states the power to regulate sales across the state line direct to customers. *United States. v. Public Utilities Commission of California* 345 U.S. 295, 303 (1953) citing *Public Utilities Commission v. Attleboro Steam & Electric Co., supra,* 273 U.S. at 89.[17]

Thus, there exist a number of sections which anticipate state regulation of hydroelectric energy. While no provision of Part I specifically authorizes a state to regulate the exportation of hydroelectric energy, no provision specifically excludes it. Appellants therefore seek an implied exclusion based on the purposes of Part I.

Part I is essentially a licensing statute focusing on the construction of dams. *See* section 23(b), 16 U.S.C. § 817 (1976).[18] In Part I Congress applied *"all"* of its constitutional authority "to the *development* of the navigable waters of the United States." *First Iowa Hydro-Electric Coop. v. FPC, supra,* 328 U.S. at 171-172 (emphasis added).

> The central purpose of the Federal Water Power Act was to provide for the comprehensive control over those uses of the Nation's water resources in which the Federal Government had a legitimate interest; these uses included navigation, irrigation, flood control, and, very prominently, hydroelectric power uses which, while unregulated, might well be contradictory rather than harmonious.

FPC v. Union Electric Co., 381 U.S. 90, 98 (1965).

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corporation owning or operating any project and developing, transmitting, or distributing power for sale or use in public service, shall abide by such reasonable regulation of the services to be rendered to customers or consumers of power, and of rates and charges of payment therefor, as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered or the rate charged. . . .

[17] 16 U.S.C. § 813 is set forth in the Appendix.

[18] 16 U.S.C. § 817 is set forth in the Appendix.

Section 10(a), 16 U.S.C. § 803(a) (1976),[29] provides a good illustration of the principles set forth in the above-quoted cases.

Section 10 establishes certain conditions with which applicants must comply in order to qualify for a license. Section 10(a) directs FERC to consider whether the project will be best adapted to a comprehensive plan:

> (1) "for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce,"
>
> (2) "for the improvement and utilization of water-power development, and"
>
> (3) "for other beneficial public uses, including recreational purposes."

It is significant that section 10(a) uses the term "waterway" in connection with the phrase "interstate or foreign commerce," rather than the defined term "navigable waters." *See* section 3(8), 16 U.S.C. § 796(8) (1976). This would apparently suggest that the essential "use or benefit" which would inure to "interstate or foreign commerce" from the navigable water would be as a highway. On the other hand, water-power development is not expressly reserved "for the use or benefit of interstate or foreign commerce."

Under the above analysis, therefore, the central issues under Part I are whether the New Hampshire statute as applied blocks the development of the Connecticut River and whether it creates dissonance among the various uses of the Connecticut River. Unlike the situation presented in *First Iowa Hydro-Electric Coop. v. FPC*, the PUC order does not prohibit the development of any project. In addition, the PUC order does not create any conflict among the possible uses of the Connecticut River.

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[29] 16 U.S.C. § 803(a) provides in part:

> All licenses issued under this subchapter [Part I] shall be on the following conditions:
>
> (a) Modification of plans, etc., to secure adaptability of project
>
> That the project adopted, including the maps, plans, and

B. *Part II of the Federal Power Act does not preempt the New Hampshire statute.*

In 1927, the Court in *Public Utilities Commission v. Attleboro Steam & Electric Co.*, held that states are prohibited by the Commerce Clause from regulating interstate wholesale rates. As a direct result, in 1935 Congress enacted Part II of the Federal Power Act, 16 U.S.C. §§ 824-824k (1976 & Supp. III 1979), to establish federal jurisdiction over such sales. *United States v. Public Utilities Commission of California, supra*, 345 U.S. at 311. *See* also *FPC v. Southern California Edison Co.*, 376 U.S. 205, 215 (1964).

Section 201(b) of the Federal Power Act grants FERC jurisdiction over "the sale of electric energy at wholesale in interstate commerce, but . . . not [over] any other sale of electric energy . . . ." Thus, wholly intrastate sales and interstate sales to consumers are exempt from such regulation.

Appellants assert that the New Hampshire statute as applied amounts to a regulation of interstate wholesale sales. In determining such an effect, however, it would be inaccurate to focus on the sales by NEP to distributors outside of New Hampshire. The statute as applied does not directly regulate such sales. The order of the PUC as upheld below deals only with sales within New Hampshire. To be sure, NEP may find it necessary or desirable to seek modifications in existing rates and contracts concerning sales outside of New Hampshire. While these consequences may flow naturally from the statute as applied, the PUC order did not specifically require any of them.

If both the state and the federal government regulate a utility, it would be expected that any regulatory action by one authority would change the circumstances of the utility and alter subsequent regulation by the other authority. Lawful state regulation

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specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit or interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes, ...

may affect federal regulation in any number of ways.[39] Such indirect effects, however, have never been held to be an invasion of the exclusive jurisdiction of FERC.

We must therefore turn attention to sales within New Hampshire. The PUC order by its terms has a more direct impact on wholesale sales within New Hampshire.

If New Hampshire had exercised the full extent of the authority under her statutes and actually required NEP to keep the hydroelectric energy solely for intrastate consumption, New Hampshire would apparently be free to regulate the rates of such sales. To the extent that appellants hang FERC's exclusive jurisdiction over sales within New Hampshire on the fact that New Hampshire had not required NEP to sever its transmission lines, appellants would again create "the anomaly . . . that statutes imposing the most extreme burdens . . . [would be] the most immune from challenge." *Hughes v. Oklahoma, supra,* 441 U.S. at 335.

Even if the power to actually retain all the hydroelectric energy does not include the power to retain only the economic benefits, the language of section 201(b) would seem to indicate that New Hampshire does have the power to exercise authority even after the energy has crossed state lines. Section 201(b) (2) provides that the provisions of Part II shall not deprive a state of lawful authority "over the exportation of hydroelectric energy *which is transmitted across a State line.*" The emphasized portion would

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[39]For example, if the PUC refuses to include the cost of construction work in progress in the rate base of a utility, that reduced rate base may have an effect on the risk of investment in that utility and consequently upon the cost of common equity. On the other hand, if the PUC sets the rates of another utility at the higher edge of the zone of reasonableness, this may also affect the cost of common equity for that utility. When either of these utilities applies before FERC for a wholesale rate increase, FERC would determine those rates on the circumstances presented by the utilities. Similarly, the PUC order may change the circumstance presented by NEP when it applies for new rates in Massachusetts and Rhode Island; but this effect standing alone does not amount to an invasion of the exclusive wholesale rate fixing authority of FERC.

appear to be redundant unless Congress intended that the states should have some continuing regulatory power even if the energy physically crosses state lines.[31]

This is not an unexpected flexibility given the nature of electrical energy. It would appear to be very difficult to insulate a utility from the interstate flow of electricity. *See FPC v. Florida Power & Light Co.*, 404 U.S. 453 (1972). Indeed, certain interconnections may be ordered by FERC notwithstanding the section 201(b) protection, as a result of the 1978 amendments.[32] If the protection, preserved by those amendments, is to have any continued effect, it must be inferred that Congress understood section 201(b) to give a state a certain amount of control over hydroelectric energy even if it is comingled with interstate energy.

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[31]The statutes preserved by section 201(b) indicate that the states would have control over rates, in addition to exportation. The New Hampshire statutes made explicit provision for the determination of reasonable rates for hydroelectric energy. P.L. 240:33, as amended by 1929 N.H. Laws ch. 106, and P.L. 240:34. While the Maine statute, Me.Rev.Stat. ch. 68, § 1 (1930), did not make such explicit reference, the Maine Public Utilities Commission had general power over setting rates for electric utilities supplying service within the state. Me.Rev.Stat. ch. 62, §§ 16-35 (1930). The Wisconsin statute, like the New Hampshire statutes, provided for the determination of reasonable rates for hydroelectric energy. Wis.Stat. § 31.27 (1931). In addition, the statute provided that the Wisconsin Public Utilities Commission had the power to declare void any contracts for sale of hydroelectric energy into which the utility may have entered. Finally, section 3*(j)* of the West Virginia statute explicitly empowers the West Virginia Public Service Commission to regulate the rates for hydroelectric energy. 1929 W.Va. Laws ch. 58, § 3 *(j)*.

[32]As discussed above, PURPA specifically made the provisions of sections 210, 211, and 212 applicable to state regulation of exportation of hydroelectric energy. *See* note 19, *supra*.

Conclusion.

For the reasons stated above, the decision of the New Hampshire Supreme Court should be affirmed.

Respectfully submitted,

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Appendix.

NEW HAMPSHIRE LAWS (1913)

Chapter 145

Sect. 17. Said act is further amended by inserting after section 16 a new section as follows:

Sect. 17. No corporation engaged in the generation of electrical energy by water power shall engage in the business of transmitting or conveying the same beyond the confines of the state unless it shall first file notice of its intention so to do with the public service commission and obtain an order of said commission permitting it to engage in such business. The commission may of its own motion or on application of any person, investigate or make inquiry, in a manner to be determined by it, as to the existence of an available market at fair rates within the state; and if it shall find that such a market does not exist within a reasonable distance of the power development, it may make an order granting such permission and may impose the condition that consumers within the state shall be furnished service by said corporation upon terms as favorable as shall be granted to consumers outside the state, having due regard to all facts and conditions which may affect said subject; *provided, however,* that nothing in this paragraph shall apply to corporations now engaged in the business of transmitting such electrical energy to any place outside the state, but any addition to such energy generated from any water power except such as it may be using in connection with such business at the date of the passage of this act, shall come under the provisions of this paragraph. *Provided, further,* that the provisions of this paragraph shall not apply to the transmitting of electrical energy generated from water powers upon the Connecticut river; nor shall they prevent any railroad corporation doing business in this state from transmitting electrical energy beyond the confines of the state for the purpose of operating its road between some point in this state and any point or points outside the state.

33. Permission Required. No corporation engaged or authorized to engage in the generation of electrical energy by water power shall engage in the business of transmitting or conveying the same beyond the confines of the state, unless it shall first file notice of its intention so to do with the public service commission and obtain an order of said commission permitting it to engage in such business. Any such corporation engaged in the business of transmitting or conveying such electrical energy beyond the confines of this state pursuant to such order shall discontinue such business in whole or in part, to such extent and under such conditions as the commission may order, whenever, after notice to such corporation and hearing thereon, the commission shall find that such electrical energy or the portion thereof affected by said order is reasonably required for use within this state and that the public good requires that it be delivered for such use. [As amended by 1929 N.H. Laws ch. 106.]

34. Investigations; Orders. The commission may, of its own motion or on application of any person, investigate or make inquiry, in a manner to be determined by it, as to the existence of an available market at fair rates within the state; and, if it shall find that such a market does not exist within a reasonable distance of the power development, it may make an order granting such permission and may impose the condition that consumers within the state shall be furnished service by said corporation upon terms as favorable as shall be granted to consumers outside the state, having due regard to all facts and conditions which may affect the subject; provided, that nothing in this section shall apply to corporations engaged in the business of transmitting such electrical energy to any place outside the state on May 15, 1911; but any addition to such energy generated from any waterpower, except such as it was using in connection with such business on that date, shall come under the provisions of this section; provided, further, that the provisions of this section shall not prevent any railroad corporation doing business in this state from transmitting electrical energy beyond the confines of the

state for the purpose of operating its road between some point in this state and any point outside the state.

NEW HAMPSHIRE REVISED STATUTES ANNOTATED (1966)

Chapter 374

374:35 Permission Required. No corporation engaged in the generation of electrical energy by water power shall engage in the business of transmitting or conveying the same beyond the confines of the state, unless it shall first file notice of its intention so to do with the public utilities commission and obtain an order of said commission permitting it to engage in such business. Any such corporation engaged in the business of transmitting or conveying such electrical energy beyond the confines of this state pursuant to such order shall discontinue such business in whole or in part, to such extent and under such conditions as the commission may order, whenever, after notice to such corporation and hearing thereon, the commission shall find that such electrical energy or the portion thereof affected by said order is reasonably required for use within this state and that the public good requires that it be delivered for such use.

374:36 Investigations; Orders. The commission may, of its own motion or on application of any person, investigate or make inquiry, in a manner to be determined by it, as to the existence of an available market at fair rates within the state; and, if it shall find that such a market does not exist within a reasonable distance of the power development, it may make an order granting such permission and may impose the condition that consumers within the state shall be furnished service by said corporation upon terms as favorable as shall be granted to consumers outside the state, having due regard to all facts and conditions which may affect the subject; provided, that nothing in this section shall apply to corporations engaged in the business of transmitting such electrical energy to any place outside the state on May 15, 1911; but any addition to such energy generated from

any waterpower, except such as it was using in connection with such business on that date, shall come under the provisions of this section; provided, further, that the provisions of this section shall not prevent any railroad doing business in this state from transmitting electrical energy beyond the confines of the state for the purpose of operating its road between some point in this state and any point outside the state.

REVISED STATUTES OF MAINE (1930)

Chapter 68

Sec. I. Transmission of electric power beyond limits of state, prohibited. R.S.c. 60, § I. [1916]. No corporation, unless expressly authorized so to do by special act of the legislature, shall transmit or convey beyond the confines of the state for the purpose of furnishing power, heat or light, any electric current generated directly or indirectly by any water power in this state; nor sell or furnish, directly or indirectly, to any person, firm or corporation, any electric current so generated to be transmitted or conveyed beyond the confines of the state for any of such purposes. Nothing in this section, however, shall prevent any railroad corporation doing business in this state from transmitting electric current, however generated, beyond the confines of the state for the purpose of operating its road between some point in this state and any point or points beyond its confines; nor shall this section apply to any corporation engaged on the third day of July, nineteen hundred nine, in conveying or transmitting electric current beyond the confines of the state, or chartered or empowered so to do, not affect or impair any contracts then existing for the transmission of electric current beyond the confines of the state.

WEST VIRGINIA ACTS (1929)

Chapter 58

Section 1. This act shall be known and cited as the "Water Power Act." All waters within the state shall be under the control

and supervision of the state. In order to conserve and utilize the energy of the power streams it is hereby declared to be the policy of the state to encourage water power development. It shall be the aim to secure for a given stream or watershed the greatest proper and practicable utilization of the power of such stream or watershed. The control and regulation on the part of the state of the development of water power shall be exercised through the agency of the public service commission of the state of West Virginia under this act. . . .

* * *

Section 3. The commission is hereby authorized and empowered . . . *(j)* To regulate the rates and charges for service to consumers of electricity and other power produced by any licensee hereunder and to regulate accounts of such licensees, all as provided by chapter fifteen-*o* of the code of West Virginia and all acts amendatory thereof. All such rates, charges and tolls for electricity and other power produced by any licensee shall be just and reasonable, and in fixing any rate hereunder the commission shall consider the rate or rates charged by the licensee or its affiliated corporations for power produced hereunder and sold without state.

* * *

[Section 6] *(f)* Under all licenses, excepting those of railroad corporations licensed solely for their own use, the reasonable needs for electric power and energy on part of the state and consumers in this state who can reasonably be served by the licensee shall have preference as compared with the needs of others, and the commission shall have power to enforce this provision by appropriate orders.

WISCONSIN STATUTES (1931)

Chapter 31

Section 31.27. Adequate service; reasonable rates. Upon complaint by any party affected, setting forth that any grantee of a

permit to develop hydraulic power and generate hydroelectric energy for sale or service to the public is not furnishing citizens of this state with adequate service at a reasonable rate in consequence of sales of such energy outside of the state, the commission shall have power to declare any or all contracts entered into by said grantee for such sales null and void in so far as they interfere with such service or rate. Such declaration shall be made only after a hearing and investigation and a recorded finding that convenience and necessity require the sale of a specified part or all such energy within this state.

UNITED STATES STATUTES (1976)

Title 16

§ 813. Power entering into interstate commerce, regulation of rates, charges, etc.

When said power or any part thereof shall enter into interstate or foreign commerce the rates charged and the service rendered by any such licensee, or by any subsidiary corporation, the stock of which is owned or controlled directly or indirectly by such licensee, or by any person, corporation, or association purchasing power from such licensee for sale and distribution or use in public service shall be reasonable, nondiscriminatory, and just to the customer and all unreasonable discriminatory and unjust rates or services are prohibited and declared to be unlawful; and whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State or to regulate and control the amount and character of securities to be issued by any of such parties, or such States are unable to agree through their properly constituted authorities on the services to be rendered, or on the rates or charges of payment therefor, or on the amount or character of securities to be issued by any of said parties, jurisdiction is conferred upon the commission, upon complaint of any person aggrieved, upon the request of any State concerned, or upon its own initiative to enforce the provisions of this section, to regulate and control so much of the services rendered, and of the rates and

charges of payment therefor as constitute interstate or foreign commerce and to regulate the issuance of securities by the parties included within this section, and securities issued by the licensee subject to such regulations shall be allowed only for the bona fide purpose of financing and conducting the business of such licensee.

* * *

§ 817. Projects not affecting navigable waters; necessity for Federal license.

It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this chapter. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined in this chapter as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this chapter. If the Commission shall not so find, and if no public lands or reservations are affected, permission is granted to construct such dam or other project works in such stream upon compliance with State laws.